

# Lethal Aid—Physician or Lawyer-Assisted Suicide?

James H. Pietsch JD\*

*This article will provide information about the current legal status of the right of a person to request physician-assisted suicide. It will provide a background on two appellate court cases which dealt with this issue and the significance of the U.S. Supreme Court's intervention.*

When United States Supreme Court Justice Antonie Scalia was asked last Spring whether the Supreme Court should take on the issue of physician-assisted suicide after two appellate courts had ruled on the issue, he remarked, "Why would you leave that to nine lawyers, for heaven's sake?" Now that the Supreme Court has intervened, many continue to ask why lawyers need to be so involved in medical decisions to end life and where the legal system may be taking all of us in the area of self-determination, death and dying with dignity. We should not espouse what Shakespeare in Henry VI had Dick (the butcher) say, as he plotted a new government: "The first thing we do, let's kill all the lawyers." Instead, first let's review what the lawyers have done.

Two influential federal appeals courts, the 9th U.S. Circuit Court of Appeals in San Francisco and the Second U.S. Circuit Court of Appeals in New York, each ruled last Spring that terminally ill patients have the legal right to request physicians (and certain other health care providers) to assist them in killing themselves. Although the two circuit courts used different legal theories, they both expanded the ability of terminally ill persons to commit suicide and provided protections to physicians and certain others who help them. The 9th Circuit Court decision has a direct impact on residents of Hawaii since its rulings apply in Hawaii as well as several other western states. Coming from two traditionally influential circuit courts and coming so close in time, the two opinions put into question laws throughout the country which directly or indirectly may prohibit assisted suicide. In *Compassion in Dying v. State of Washington*, 79 F.3d 790 (9th Cir. (Wash.) March 6, 1996) three terminally ill patients (a 69-year old retired pediatrician who had suffered since 1988 from cancer which eventually metastasized throughout her skeleton, a 44-year old artist dying of AIDS and a 69-

year old retired sales representative who suffered from emphysema which caused him a constant sensation of suffocating), four physicians, and nonprofit organizations brought suit against the state of Washington. They sought a declaration that a statute that prohibited causing or aiding another person to commit suicide violated the Federal Constitution. The 9th Circuit Court ruled that the Washington statute which banned the promotion or assistance of suicide and which prohibits physicians from prescribing life-ending medication for use by terminally ill, competent adults violates the due process clause of the 14th Amendment of the United States Constitution. In its ruling, the court stated, "The decision how and when to die is one of the most intimate and personal choices a person may make in a lifetime, a choice central to personal dignity and autonomy."

Significantly, in a footnote in *Compassion in Dying* the court indicated that legally recognized surrogates (such as those appointed in a valid durable power of attorney) should also be permitted to carry out decisions for physician-assisted suicide when the patient is no longer able to communicate such decisions. The court indicated that the state's duty to preserve life is outweighed by the right to control "the time and manner of one's death." It also indicated that "a competent, terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incompetent." *Compassion in Dying* was the first right to die case that the 9th Circuit Court or any other federal court of appeals has ever decided.

On the East Coast, in *Quill v. Vacco*, 80 F.3d 716 (2nd Cir. (N.Y.) April 2, 1996), the 2nd Circuit Court ruled that two New York statutes penalizing assistance in suicide violated the equal protection clause of 14th Amendment of the U.S. Constitution. The action giving rise to this appeal was commenced by a complaint filed by three physicians and three individuals then in the final stages of terminal illness (a 76-year-old retired physical education instructor who was dying of thyroid cancer, a 48-year-old publishing executive suffering from AIDS and a 28-year-old former fashion editor under treatment for AIDS). Each of these plaintiffs alleged that she or he had been advised and understood that she or he was in the terminal stage of a terminal illness and that there was no chance of recovery. Each sought to hasten death "in a certain and humane manner" and for that purpose sought "necessary medical assistance in the form of medications prescribed by (her or his) physician to be self-administered."

The physician plaintiffs alleged that they encountered, in the course of their medical practices, "mentally competent, terminally ill patients who request assistance in the voluntary self-termination of life." Many of these patients apparently "experience chronic, intractable pain and/or intolerable suffering" and seek to hasten their deaths for those reasons. Each of the physician plaintiffs has alleged that "under certain circumstances it would be consistent with the standards of (his) medical practice" to assist in hastening

\* William S. Richardson School of Law  
University of Hawaii Elder Law Program  
2515 Dole Street  
Honolulu, Hawaii 96822  
Ph (808) 956-6785  
Fax (808) 956-9439

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death by prescribing drugs for patients to self-administer for that purpose. The physicians alleged that they were unable to exercise their best professional judgment to prescribe the requested drugs. The other plaintiffs alleged that they were unable to receive the requested drugs, because of the prohibitions contained in sections of the New York Penal Law. All plaintiffs were residents of New York.

In *Quill v. Vacco*, the 2nd Circuit held that the New York statutes criminalizing assisted suicide violated the Equal Protection Clause of the Federal Constitution because, to the extent they prohibited a physician from prescribing medications to be self-administered by a mentally competent, terminally-ill person in the final stages of his terminal illness, they were not rationally related to any legitimate state interest. In this case the court did not find that assisted suicide is a constitutional right. Rather it found that the New York law failed to uphold the constitutional guarantee of equal protection of the law. Patients on life-support equipment are allowed to hasten their deaths by instructing their physicians to withdraw or withhold life-sustaining treatment but patients desiring lethal doses of medication to hasten their deaths are denied that right. In its decision the court stated: "What interest can a state possibly have in requiring the prolongation of life that is all but ended? And what business is it of the state...to interfere with a mentally competent patient's right to define (his) own concept of existence, of meaning, of the universe, and of the mystery of human life?"

Just when it seemed that the medical and legal communities had exhausted their respective predictions on what would happen next, the U.S. Supreme Court did what nobody seems to have predicted. First, Associate Supreme Court Justice Sandra Day O'Connor temporarily blocked the 9th Circuit Court's ruling that struck down Washington state's ban on physician-assisted suicide. Justice O'Connor's order was to remain in effect until her further order or a subsequent order of the U.S. Supreme Court or at least until all briefs related to an expected appeal to the full U.S. Supreme Court had to be submitted. Then, in what would be called *Washington, et al., applicants, v. Harold Glucksberg, et al.* No. A-974, the Supreme Court of the United States on June 10, 1996 issued the following unusual subsequent stay:

Application for stay of issuance of mandate of the United States Court of Appeals for the Ninth Circuit, case No. 94-35534, issued on May 29, 1996, presented to Justice O'Connor and by her referred to the Court is granted pending a timely filing and disposition by this Court of a petition for writ of certiorari. Should the petition for a writ of certiorari be denied, this stay terminates automatically. In the event the petition for a writ of certiorari is granted, this stay shall continue pending the sending down of the judgment of this Court.

In October the court decided to grant Certiorari. Clearly, we are in a new environment when it comes to dealing with the issues of self-determination, death and dying with dignity. Ultimately, the issue of physician-assisted suicide will be decided by the United States Supreme Court. The Supreme Court may be interested in consistency in dealing with this issue or it may leave the issue to be decided by the respective states. Whether the decisions are permitted to stand or not, many questions must still be resolved. If it is permitted, will physician-assisted suicide be limited to terminally ill patients? If so, who will decide whether a person is terminally ill and how will the term be defined? Who will determine if a person is of sound mind and not, for example, clinically depressed? Who determines if a person is making a request voluntarily and whether the person is "competent" to make decisions? What are the limits, if any, to a person's right to self-determination—to refuse unwanted treatment or to seek relief from pain or to commit suicide? May a person designate a surrogate to carry out his or her decisions? What safeguards will patients have and what standards will medical

personnel need to follow, if any? What interests do the states have in this area?


Until we get more guidance from the court, the dilemma of how to approach physician-assisted suicide will continue to face the medical profession. Even after the courts have ruled, guidelines will have to be established to reflect a new environment with respect to self-determination, death and dying with dignity. In seeking to regulate what may appear to be unregulated, a multi-disciplinary approach will serve to protect the legal interests of the entire community while taking into consideration important medical, religious, moral and ethical concerns. While lawyers may not seem to be the most likely profession to deal with medical matters of life and death, fundamental constitutional interests and legal protections are involved. The medical profession may have no choice but to include the legal profession, along with legislatures and others concerned with the welfare of our community in addressing these grave issues. Lawyers should be seen as assisting physicians to assist their patients with decisions about their own lives.

#### Editor's Note:

James H. Pietsch, JD, is the Director of the University of Hawaii Elder Law Program (U.H.E.L.P.) and Associate Professor of Law at the U.H. William S. Richardson School of Law. He received his B.A. at Georgetown University and Juris Doctor degree at the Catholic University of America in Washington, DC. He is very active in our University, serving on the Council on Aging, the Center on the Family Advisory Committee and the Committee on Human Studies.

Jim is also a very active member of Ah Quan McElrath's Ad Hoc Committee on Death with Dignity. Thank you, Jim, for reviewing the complicated legal aspects involved with "lethal aid".

The issue of Death with Dignity is the ultimate example of medical teamwork—not just physicians, but attorneys, legislators, the clergy, social workers, family members and the general public must work together to develop sensible and compassionate guidelines for those who need our help when they cannot help themselves.



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David M. Amberger, M.D.

2036 Hau Street Honolulu, HI 96819  
(808) 842-6600 Fax: (808) 848-0663